COMPARATIVE LAW

TRUST AND "TREUHAND" IN SWISS LAW

The English word "trust" is often used in the Swiss language untranslated as a foreign word, in a sense which is very different from the one in the original language. In Switzerland the word "trust" means something like "a monopolised concern having subsidiary companies, which abandoning their individual economic existence, are fused together with the parent company to such a unity that its centralised management has a monopolistic control of the market."[1]

However, if we wish to speak about "trust" in Switzerland in the Anglo-American sense we translate the word into German with Treuhand, in French with fiducie,[2] in Italian with fiducia.

Seen purely from the legal standpoint, there is a great difference between our Treuhand and the trust of Anglo-American law. In Swiss law the trustee is of little importance.[3] Nevertheless the Treuhand is quite common here, but in the arbitrary, contractual form.

By "trustee" we understand a person "to which rights are entrusted with the purpose that this person will use them in the interest of the settlor, in accordance with the latter's instructions."[4]

Speaking of the Treuhand we distinguish between the Treugeber (in English settlor, in French fiduciant, in Italian fiduciante), the Treuhänder (in English trustee, in French fiduciaire, in Italian fiduciario) and the Begünstigter (in English beneficiary, in French beneficiaire, in Italian beneficiario).

According to Swiss law all things and rights can be entrusted to somebody, provided they are not of highly personal nature and therefore intransmissible. Through this action the trustee gets *full ownership*, if it concerns things, and if rights are transmitted (for instance claims) he becomes a *full authority* (creditor). The legal relationship between the trustee and the settlor falls under the law of obligations and not of the law of things. The settlor, however, has a claim against the trustee, which is that the latter

[1] Grener in the *Schweiz. Juristische Kartothek*, Finanzgesellschaften, IV, p. 2
[2] *Cf.* Piccard, Steiner, Thilo, *Dictionnaire juridique*, under "fiduciaire," etc., pp. 246 *et seq.*
[3] In Rivoire's *Dictionnaire du Code Civil Suisse* the word "fiducie" and its derivations are completely missing.
[4] Gerstle, *Das reine Treuhandgeschäft im schweiz. Recht*, p. 11.

administers the things entrusted to him in the settlor's interest and in accordance with his instructions. If the trustee acts against these instructions and, for instance, alienates the entrusted thing to a third person, taking it bona fide, the settlor cannot take any action against the third person. The settlor would only have an action for damages against the trustee. Furthermore, if the trustee declares himself bankrupt, the entrusted things fall under the estate of the bankrupt; the settlor has no right for separation. For his claim on damages he has only the position of an ordinary creditor. The trustee who does not comply with the instructions of the settlor is guilty of unfaithful management.[5]

Therefore, one must act cautiously when choosing the trustee. As a rule one should appoint a trust company as trustee. The name "Treuhandgesellschaft" is not protected in Switzerland, so that one should not choose any company. However, there are quite a number which are very well managed.

The Swiss Federal Court defines the Treuhand as follows:—

> "The character of the fiduciary act lies in this, that one of the contracting parties (the settlor) creates a legal position for the other (trustee) which makes him unlimited owner of a right towards third persons, while he is obliged, under the contract with the settlor, to exercise the transmitted right not at all, or only partially, or to retransmit it under certain supposition. . . ."[6]

In order to transfer property (real estate or moveable), in accordance with Swiss law a basic act[7] is necessary to give title, the so-called causa. Frequently this basic act is a contract. The trust contract comes under the stipulations of the simple mandate (SCO Art. 394 *et seq.*) and forms a causa. In case of real estate the transferee (trustee) has to be registered in the land register; only upon registration does he acquire ownership.[8] Movables have to pass into the possession of the trustee, in order that he may become legal owner.[9]

When a claim is transferred Swiss law does not require a causa, it is therefore of abstract validity.[10] The transfer-contract, however, must be drawn up in writing and the debtor must be notified of its conclusion.

[5] Art. 159, Swiss Penal Code.
[6] BGE, 71, II, p. 100 = Praxis, XXXIV, p. 302.
[7] Art. 657 and 974, S.C.C., for real estates. For movable property there is no disposition in the law; but the jurisprudence of the Federal Court stands on this ground, *cf.* Brodbeck, Daeppen, Welti *Bundesgerichtspraxis zum Zivilgesetzbuch II*, Notes to Art. 714.
[8] Art. 656, Swiss Civil Code.
[9] Art. 714, Swiss Civil Code.
[10] Art. 165, Swiss Code of Obligations.

Furthermore, Swiss law knows special institutions with which the same or similar objectives can be attained as in Anglo-American trust law. These are certain corporations, such as the family foundation and the joint-stock company (holding-company).

The family-foundation originates with the dedication of a fortune for the purpose of safeguarding certain interests of a family. It requires one single administrator (also called Curator), and has not to be registered in any public register.

The formation of joint-stock companies (and of other corporations) is comparatively easy in Switzerland, since no governmental licence is necessary.

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CANADIAN UNIFORM LAWS COMMISSION

The 1950 proceedings of the Canadian Uniform Laws Commissioners show evidence of quite as great activity as usual. The following Acts were adopted by the Conference and recommended for enactment: Intestate Succession Act, Assignment of Book Debts Act, and Crown Proceedings Act. The two former Acts replace uniform Acts already in existence and very widely adopted. The Crown Proceedings Act is of course new and follows closely our own Act of 1947. The main differences seem to be section 14 "In proceedings against the Crown, the trial shall be without a jury"; and a general simplification and shortening of language. Canadian draftsmen seem to have achieved a style considerably less cautious and rotund than that still in vogue in this country. It would be interesting to see whether they lose anything in precision. The omission from the Uniform Act of some portions of our Act is explained by the fact that such topics as Industrial Property and the Maritime Conventions Act, 1911, Salvage, Postal Packets and the Armed Forces are not the concern of the Provinces but of the Dominion. Wherever possible the commissioners have kept to the operative words of our Act.

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AUSTRALIAN COMMENTARY

Legitimation

IN a previous comment [1] I discussed some of the problems involved in according recognition abroad to a claim of legitimation under

[1] 3 I.L.Q. 566–571.